

BEFORE THE ENVIRONMENT AND LAND USE APPEAL TRIBUNAL

Cause No.: ELAT 1472/17

In the matter of:

HARRIS KISSOON & OTHERS

Appellants

v.

DISTRICT COUNCIL OF MOKA

Respondent

DETERMINATION

The appeal is against the decision of the District Council of Moka for having refused to grant a Building and Land Use Permit to the Appellant for the excision of a plot of land of the extent of 1688.35 square metres from a larger portion of an extent of 8355.18 square metres at La Laura. The proposed excision is applied for residential purposes. The Respondent's refusal is based mainly on Policy SD4 of the Outline Planning Scheme and as per letter dated 14th August 2017, the Respondent informed the Appellant of its decision on the following grounds:

1. (a) The site lies on the edge but outside the main Settlement Boundary of La Laura village and owing to the existing context (whereby, among others, affluent of Riviere Moka acts as a physical break) the development does not qualify under the criteria specified under Policy SD3; and
(b) The site lies at approximately 200 metres from the second settlement boundary of La Laura village whereby there is a general presumption against development.
2. In furtherance to the justification highlighted above, the site does not meet the sequential approach for the release of land for development and will encourage ribbon development notwithstanding the fact that the previous excision (Morc/0208/2014) was approved for residential purpose. In any case the previous

approval cannot be construed as a commitment on the District Council's part to release further land for development. In fact it was following your letter dated 20 October 2014 that the said excision was exceptionally approved under hardship criteria which ought to have been donated to deprived widow Mrs Reshma Devi Bhowmath and her four children but to no avail and instead same was sold to one Mrs Premila Purboteeah.

The Appellant now appeals on two grounds which are basically that the applicable planning policy should have been Policy SD3 which provides that there should be a general policy in favour of development on the edge of but outside settlement boundaries subject to certain prescribed conditions being fulfilled, and that the first reason for refusal that has been evoked by the Respondent contains a blatant contradiction inasmuch as Policy SD 4 refers to a presumption against development outside settlement boundary and Policy SD3 contains a presumption in favour of development.

The second ground of appeal is the inconsistency in decisions of the Respondent inasmuch as approval had been granted for the excision of an extent of 845,56 square metres, which then formed part and parcel of the subject site and were faced with the same physical barrier of the affluent of Moka River. Furthermore the issue of 'hardship criteria' is denied on the ground that the criterion pertaining to same is not satisfied in terms of the extent of land released and which should not normally exceed 422 square metres.

The Respondent has highlighted that the approval had been given in the first application for excision, in the light of elements that had been brought before it, and this had been assessed as a hardship case (i.e the excised property was meant to be a donation to a needy person and the intervention of the National Empowerment Foundation had been sought in this context). The bad faith of the then applicant (now appellant) has been raised as the excised land has instead been sold to a third party. The Appellant thought it fit to dispute this averment by relying on the technical definition of what amounts to a 'hardship' application. The Appellant has not rebutted the averment of 'mala fides' on his part. We find it most inappropriate for the Appellant to raise inconsistency in decision-making and rely on the BLUP granted in those circumstances as a precedent that binds the Respondent. The strict definition of 'hardship criteria' under the planning instruments does not absolve the Appellant from the duty to come before this jurisdiction with clean hands. We shall not interfere with the judgment of the Respondent on this score and do not uphold the second ground of appeal.

As regards the first ground of appeal, **Policy SD 4** lays down a *general presumption against proposals for development outside settlement boundaries unless certain criteria, as listed in the policy, are met*. One of those criteria is if the proposal *"is capable of*

connection to existing utility supplies and transport networks or can be connected without unacceptable public expense". On the other hand, Policy SD3 relates to "development on the Edge of Settlement Boundaries", namely it sets out that there should be a general presumption in favour of development on the edge of but outside defined settlement boundaries providing such development proposals are aimed at, among other conditions, "consolidating gaps in an otherwise built up area; or rounding off an existing settlement being contiguous with existing built-up area and are not creating or progressing ribbon developing..." and the proposals are capable of connection to existing utility supplies and transport networks or can be connected without unacceptable public expense..."

Evidence adduced by the Appellant is to effect that the site where the proposed excision is located faces a two meters wide tarred and public road and there are some ten to fifteen houses already constructed on both sides of the road (as shown on the context plan produced as Document B). He added that there is provision of electrical amenities, water supply and telephone connection and that there has been an exemption from a land conversion permit for the said land (as shown in Annex 7 to the statement of case). The Appellant has also been granted approval by the Ministry of Agro Industry for the excision of land with four conditions, one being that no development be carried out within the reserve to River Moka and a setback of three metres should strictly be observed (Annex 8 to the statement of case). These are objective elements which have not been rebutted and which tend to show that the criteria as laid down in Policy SD3 are met with.

The representative of the Respondent maintained that in the Council's assessment, the applicable policy is Policy SD 4 being given that the site in lite is found outside settlement boundary. In the statement of defence, the Respondent avers that the site *"merely touches the limit of the settlement boundary on one extreme only whereas the excised lot is in fact outside..."*. We find that the position of the Respondent contains inherent contradictions: the first ground of refusal as contained in letter dated 14 August 2017 is that *"the site lies on the edge but outside the main settlement boundary"*. This was confirmed in the cross examination of the representative of the Respondent. Yet, the Council chose to assess the application only in the light of Policy SD4. Despite the explanations given by the representative, we are still unclear as to what was the rationale for this, the more so that the representative confirmed that there is a residential morcellement that has been approved by the Morcellement Board towards the north of the site. The application for an excision for residential purposes would serve the purpose of 'infilling' as provided by Policy SD3. We note also that nothing is said in Policy SD3 as regards the part or fraction of a site that is required to qualify as 'being on the edge'. The position of the Respondent, as taken in the statement of defence, is to the effect that *'the site merely touches the limit of settlement boundary on one extreme*

only whereas the excised lot is outside settlement boundary'. This assessment of the Respondent is not based on any planning policy.

In the light of the above, it is our view that, despite the observations made in relation to the second ground of appeal, the first ground of appeal has been substantiated. We accordingly allow the appeal under this ground.

Delivered by:

Mrs. Vedalini Phoolchund-Bhadain, Chairperson

Mr. Pravin Manna, Member

Mrs. Purnima Devi Rawotteea, Member

Date:

13th ~~10th~~ February 2020
